AUG 13 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

Vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent.

No. 485

PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS AND BRIEF

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Nathan Inman Goff, Jr., a citizen of the United States, presently residing in the City of Sarasota, State of Florida, formerly a resident citizen of Memphis, Shelby County, Tennessee, and respectfully petitions this Honorable Court for Writs of Certiorari and Supersedeas.

MAY IT PLEASE YOUR HONORS:

Your petitioner, Nathan Inman Goff, Jr., respectfully represents and shows to the Court that he was and is very much aggrieved by the action of the Supreme Court of the State of Tennessee in denying his Petition for Writs of Certiorari and Supersedeas in that Court and subsequently denying his Petition to Re-Hear in said Court; which action of the Supreme Court followed a denial of this petitioner's Petition for Writs of Certiorari and Supersedeas by the Court of Appeals of the State of Tennessee, at Jackson, wherein said Court of Appeals remanded to the Circuit Court of Shelby County, Division VI, for such further and other action as may be properly and legally had therein, with no prejudice to the rights of any party in the future proceedings of that Court resulting from the filing of the petition in the Court of Appeals and adjudged the costs of the temporary proceeding against the petitioner.

Your petitioner had petitioned the Court of Appeals for Writs of Certiorari and Supersedeas to obtain relief from the opinions and judgments rendered against him by the Honorable Friel Hastings, Judge, Division VI of the Circuit Court of Shelby County, Tennessee, at Memphis, on the 12th day of August, 1966, wherein said Court overruled the motion by petitioner "For transfer of cause to another Division of Court" and, on a motion by respondent wherein the Court interpreted a Consent Order Modifying Injunction and ordered certain funds disbursed and declined to grant petitioner a discretionary appeal.

Further, petitoner seeks to invoke the inherent and statutory power of the Appellate Courts of the State of Tennessee, with respect to the issuance of the Writ of Certiorari, to enforce the supervisory jurisdiction of the proceedings and judgments of said Circuit Court, and inferior tribunal.

JURISDICTION

Two basic constitutional questions are raised by this petition, to-wit:

I

Denial of due process of law: United States Constitution, Amendment V: "No person shall be *** deprived of life, liberty, or property, without due process of law; ***, without just compensation."

II

Denial of equal protection of law. United States Constitution, Amendment XIV, Section I. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

STATEMENT OF CASE

Petitioner sued respondent for divorce in the Circuit Court of Shelby County, Tennessee, on the 23rd day of December, 1965. (TR 36)

On January 5, 1966, respondent filed an Answer and Cross-Bill for Separate Maintenance and for Injunction (TR 27) and the Judge granted an injunction whereby petitioner was enjoined "from disposing of any stocks, monies, trust agreements or property, either by himself or through his attorney or agent." (TR 34)

On April 12, 1966, a Consent Order Modifying Injunction (TR 61) was entered in this cause which provided for the dividing of certain gold stocks and certain dividends due on said gold stocks in half and finding that your petitioner was due $199.50 credit against the respondent. Subsequently an order was entered as of May 13, 1966 (TR 67) in which the Court ruled "That the Court however is of the opinion that this credit should remain on the books and not be charged against the defendant's

monthly support check in the amount of $243.00, ***."

Petitioner moved the Court "For transfer of cause to another Division of Court," but was overruled by the Court in its order entered as of August 12, 1966 (TR 75).

Petitioner moved the Court for a discretionary appeal following the order of August 12, 1966, above mentioned, which the Court denied; whereupon petitioner duly filed his Petition for Writs of Certiorari and Supersedeas in the Court of Appeals of the State of Tennessee, at Jackson; subsequently duly filing his Petition for Writs of Certiorari and Supersedeas in the Supreme Court of the State of Tennessee and, on April 3, 1967, said Supreme Court denied the petition; that a Petition to Re-Hear was filed promptly on April 6, 1967, which Petition to Re-Hear was denied by said Court on May 15, 1967.

On May 30, 1967, petitioner's attorney, by letter to the Clerk of the Supreme Court of the State of Tennessee at Jackson, requested: "It is respectfully requested that the record in the above styled cause be sent to me in order that the appropriate printing may be accomplished for presenting this matter to the United States Supreme Court. Your cooperation in this respect will be sincerely appreciated." to which there was no response and another letter to said Clerk dated June 14, 1967 was sent certified mail, return receipt requested calling the Clerk's attention to the previous letter and again requesting the record to be sent, to which letter request a reply from said Clerk dated June 15, 1967 was received, stating as follows:

> "I apologize for my delay in replying to your letter of May 30th.
>
> I have your letter of 14th with further reference to obtaining the record in the above case, and call your attention to Rule 8 of the Supreme Court and Rule 7 of the Court of Appeals to the effect

that transcripts in ended cases may not be removed from the court archives by anyone for any purpose.

I refer you to Rule 10 of the Supreme Court of the United States with reference to making up records for that Court. It appears to me that the record would have to be made up, certified by the clerk of this court and forwarded. After looking at the rules you might advise me if you would like for the record to be forwarded to the Clerk of the Circuit Court. This can be done as the order entered in this case on February 23, 1967, provided that the case be remanded to the Circuit Court of Shelby County.''

By letter dated June 16, 1967 said Clerk was advised regarding Rule 38 of the Supreme Court of the United States and again requested a certified copy of the transcript of the record in this case be prepared and forwarded as soon as possible. Subsequently, on June 20, 1967, by long distance telephone, said Clerk discussed the matter further with petitioner's attorney and requested a letter from petitioner's attorney requesting the transcript to which petitioner's attorney agreed and sent a letter dated June 20, 1967, which letter appears in the record in Volume A preceding the index.

Ultimately, at 10:55 A.M. Central Daylight Savings Time on June 30, 1967, the certified record was received by petitioner's attorney and this petition was immediately commenced.

ASSIGNMENT OF ERRORS

1. The Trial Court abused its discretion in granting the injunction prayed by respondent (TR 34, 78, 84) in that it was all-inclusive, completely stripped the complainant and

cross-defendant of all of his rights to continue his business or personal affairs, even to the extent of expending pocket monies for food, sustenance and shelter.

2. The Trial Court abused its discretion in that the injunction granted, though unreasonable and oppressive, was not modified upon motion of petitioner; but said injunction was kept in full force and effect until the parties themselves negotiated for and obtained entry of the Consent Order Modifying Injunction on April 12, 1966. (TR 39, 40)

3. The Trial Court acted illegally in its Order Modifying Injunction entered August 12, 1966. (TR 73)

4. The Trial Court erred by entering the Order Modifying Injunction on August 12, 1966 in that the Consent Order Modifying Injunction entered April 12, 1966 (TR 61) clearly provides that dividends to become due in the future would no longer be under the control of the injunction, thus making such dividends the separate property of the petitioner, as trustee; the Consent Order being an agreement between the parties and elevated to the distinction of a Court Order, binding the court and the parties.

5. The court erred in not recognizing a trust in existence (TR 92) which was entered into previous to the marital difficulties of the parties and which Trust Agreement includes minors as beneficiaries thereof; but the court imposed orders upon the trust without first following legal prerequisites including the appointment of a guardian ad litem, a report from said guardian and a finding in regard to the interests of the children.

6. That the Trial Court erred when, on its own motion, it ordered payment of funds in excess of the support and maintenance awarded respondent previously, (TR 73, 74, 140, 141, 149, 150) though petitioner was neither in contempt of court nor in arrears for payment of support and maintenance.

7. The Trial Court abused its discretion in failing to follow its own Rule X (TR 137) which reads as follows:

"RULE X—MODIFICATION OF DECREES

Counsel seeking a modification of any decree shall present to the Judge in whose Court said cause is pending a sworn petition setting forth therein the grounds upon which said modification is sought, the change in the circumstances and conditions of the parties relied upon, and the Judge thereupon shall set a day certain for the hearing of such petition."

8. It was error for the Trial Court to rule consistently as suggested by the attorney for the respondent and to repeatedly ignore the rights of the petitioner. (TR 38, 107, 111, 112; 39, 86, 87, 88, 98, 101, 102; 67, 127, 132; 73)

9. It was improper for the Court on several occasions to make statements to the effect that petitioner was in contempt of court or might be in contempt of court and to promise heavy punishment if he were found to be in contempt of court. (TR 124, 129, 130, 132)

10. The Appellate Courts of the State of Tennessee erred in denying petitioner's Petition for Writs of Certiorari and Supersedeas.

BRIEF

As to the first Assignment of Error, the Court grossly abused its discretion in issuing the injunction (TR 34) in that the Injunction was all-inclusive, and completely denied petitioner of all of his rights to continue his business or personal affairs, even to the extent of expending pocket monies for food, sustenance and shelter and of completely suspending complainant's investment business.

Petitioner's Original Bill for Divorce (TR 8) alleges certain real property was conveyed to

husband and wife, thereby creating a tenancy by the entirety therein, and that the defendant contributed absolutely nothing toward the purchase of any of said real property.

In respondent's Answer and Cross-Bill (TR 29) respondent admitted the ownership alleged by petitioner and did not deny petitioner's allegation that she contributed absolutely nothing toward the purchase of any of said real estate.

Respondent in her pleading above mentioned (TR 32) prayed for separate maintenance and support of the children and herself and did not pray for a divorce nor did she give a statutory ground for divorce, being a prerequisite in the State of Tennessee for a divorce to be granted.

Gibson's Suits in Chancery (The Chancery Bible in the State of Tennessee) Section 879 provides: "**Discretion of the Chancellor in Granting Injunctions.**—In granting temporary relief by interlocutory injunctions, Court of Equity in no manner anticipate the ultimate determination of the question of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property, or rights, in issue, in status quo, until a hearing upon the merits. In order to sustain an injunction for the protection of property pendente lite, it is not necessary to decide in favor of the complainant upon the merits, nor it is necessary that he should present such a case as will certainly entitle him to a decree, upon the final hearing. The Court will, however, upon an application for an interlocutory injunction, consider the probability of the complainant ultimately establishing

his demand."

Cited by above is High on Injunctions, Section 5. Also cited by above is Note 38 as follows: "It is frequently said that the grant or refusal of an injunction is a matter of discretion. This is true if such discretion arises from a consideration of the fixed rules of Law and Equity, and is governed by an impartial purpose to rigidly apply those rules to the case at hand. In this State no man's rights should be dependent on a Judge's whim, or mood, or favor. If the complainant is entitled to the injunction, it is his right, and the Chancellor is in duty bound to grant it; and it would be tyranny and usurpation to withhold the grant. On the other hand, if the complainant is not entitled to an injunction, it would equally be tyranny and usurpation to bestow the grant. Where, however, it is doubtful whether an injunction should be granted, after duly considering the equities alleged, and the relative advantages and disadvantages which would result to the parties from granting or refusing the writ, in such a case an injunction should be denied. A Judge has discretion to do what in law he is in duty bound to do; but no discretion to deny any man any of his rights, or to give any man more than his rights; nor has he any discretion to withhold from any one what the law gives him, or to give to any one what the law withholds from him. Discretio est scire per legem quid sit justum. (Discretion is to know by means of the law what is just.) See preface to Lube's Eq. Pl. (Wheeler's Ed.), XII-XIII; McMinnville & M. R. Co. v. Huggins, 47 Tenn. 217, 226; Flippin v. Knaffle, 2 Tenn. Ch.

238; ante, Sec. 625, note 4; post, Sections 903, 948."

As to Assignment of Error two, the injunction granted was unreasonable and oppressive and it was sought to be modified by petitioner by motion "To dissolve injunction issued against Nathan Inman Goff, Jr.", (TR 39) but the Court declined to grant the motion to the extent requested and modified the injunction only to the extent of releasing certain funds from a bank and a real estate agent, leaving at least $128,000.00 in value of real property on which there existed $58,000.00 in mortgages (TR 79) and certain gold stock worth $136,750.00 (TR 80) still under injunction, though investments and stock transactions were the business of petitioner (TR 82) and the effect of the injunction was to prohibit petitioner from engaging in his business.

Further, on Assignment of Error two, a Consent Order Modifying Injunction (TR 61) was entered as of April 12, 1966, being the first significant relief petitioner obtained from the all-inclusive injunction, causing petitioner to be forced to negotiate with respondent.

As to Assignment of Error three, the Consent Order Modifying Injunction (TR 61) was binding on the parties and when entered by the Court was also binding on the Court. This is basic and academic. However, the Trial Court entered its Order Modifying Injunction (TR 73) August 12, 1966 in effect rewrote the Consent Order Modifying Injunction and subjected one-half of certain dividends in the hands of Merrill Lynch, Pierce, Fenner & Smith, Inc. to be paid to Richard T. Ely as Trustee for Sue Ellen Weems Kinney Goff and the two minor children of the parties, who shall pay from said funds to Sue Ellen Weems Kinney Goff, for herself and the use and benefit of the two minor children of the parties, the sum of $243.00 per

month; and to Leader Federal Savings & Loan Association the sum of $111.00 per month, being the monthly installments on the mortgage on the residence where respondent lived; all without benefit of attachment or other process; to all of which action of the Court petitioner here, complainant and cross-defendant below, excepted and prayed for a discretionary appeal, which the Court refused, and to which further action the complainant and cross-defendant excepted.

On Assignment of Error four, reference to the provisions of the Consent Order Modifying Injunction entered April 12, 1966 (TR 61) the following provisions will be found: "The parties reached an agreement, whereby *** and one-half of certain gold stock, held by Merrill Lynch, Pierce, Fenner & Smith, Inc. heretofore impounded by injunction, and dividends due, **or to become due** on said gold stock should be removed entirely from the aforesaid injunction." (Emphasis supplied) Therefore, dividends referred to by the order of August 12, 1966 (TR 73) were neither under injunction nor attachment and were the separate property of the petitioner, as Trustee. The Court had no jurisdiction over the dividends, but without any authority, ordered them paid into the hands of the Clerk, which actions were objected to by the petitioner. (TR 74)

As to Assignment of Error five, the Court refused to appoint a guardian ad litem to report on and act in the interest of the children of the marriage. The existence of the Trust, which was never denied, was called to the attention of the Court on several occasions. (TR 79, 92, 95, 96)

Tennessee Code Annotated, Section 34-201 provides: "The county court shall have full power to take cognizance of all matters concerning minors and their estates, and, whenever it appears necessary, shall appoint a guardian for an infant within

its jurisdiction, but the powers of the Chancery Court over such estates are not abridged."

As to jurisdiction of the Circuit Court in Tennessee, Tennessee Code Annotated, Section 16-508 provides: "It has concurrent jurisdiction with the Chancery Court to grant divorces, ***." and Section 16-511 provides: "Any suit of an equitable nature, brought in the Circuit Court, *** may be *** heard and determined by the Circuit Court upon the principals of a Court of Equity, with power to order and take all proper accounts and otherwise to perform the functions of a Chancery Court."

As to Assignment of Error six, the record reflects that petitioner was not in arrears for payment of support and maintenance but the Court, on its own motion, ordered payment of funds in excess of the support and maintenance previously awarded respondent. (TR 73, 74, 140, 141, 149, 150)

As to Assignment of Error seven, the assignment speaks for itself, further indicating the pattern of constant and consistent abuse of discretion.

Again, in Assignment of Error eight, continuous and repeated discrimination against petitioner and favoring of respondent is noted. (TR 38, 107, 111, 112; 39, 86, 87, 88, 98, 101, 102; 67, 127, 132; 73)

Further bolstering petitioner's contention of the repeated acts of the Trial Court showing animosity toward petitioner without justification is noted in Assignment of Error nine. (TR 124, 129, 130, 132)

As to Assignment of Error ten that the Appellate Courts of the State of Tennessee erred in denying petitioner's Petition for Writs of Certiorari and Supersedeas, the following authorities are respectfully noted:

"It is settled by the case of State ex rel. McMorrow v. Hunt, 137 Tenn. 243, 192 S. W. 931, that this supervisory or superintending writ may be granted in a proper case although the decree is not final. In the case of Conners v. (City of) Knoxville, 136 Tenn. 428, 189 S.W. 870, it is said:

"' "Certiorari" at common law performed the function of aid to a review and supervision of the proceedings of inferior boards and tribunals by a superior tribunal, not taking the place of appeal of writ of error, but bringing up the entire record in order to a determination whether there had been an absence or excess of jurisdiction, or a failure to proceed according to the essential requirements of the law.' 136 Tenn. at page 432, 189 S.W. at page 871."

"Considering further the authority of this Court to review the action of the trial court, as complained of by appellants, the foregoing opinion of Mr. Justice Swepston is sound in principle and finds added support in Cockrill v. People's Savings Bank, 155 Tenn. 342, 293 S.W. 996, 998, wherein it is held (opinion by Mr. Chief Justice Green), as follows:

"The court has broad powers, **inherent and statutory**, with respect to the issuance of the writ of certiorari, to enforce the supervisory jurisdiction of the proceedings and judgments of inferior tribunals."

"The appellate courts of the State have the same jurisdiction to award the writ of certiorari in cases where appeal or writ of error does not lie, to correct the errors of inferior courts of law or equity, that the circuit court has in such cases

to award such writ to correct the errors of inferior tribunals."

"The question to be determined at the outset is whether or not this is a case in which writs of certiorari and supersedeas should be granted.

"TCA 27-801 provides as follows:

"27-801. Constitutional basis.—The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy."

In Conners v. City of Knoxville, 136 Tenn. 428, at page 433, 189 S.W. 870, at page 871, Mr. Justice Williams quoted from the case of Tennessee Central RRd. Co. v. Campbell, 109 Tenn. 640, 645, 75 S.W. 1012, as follows:

" ' "The writ of certiorari does not owe its existence to constitutional provisions or statutory enactment. It is a common law writ, of ancient origin, and one of the most valuable and efficient remedies which come to us with that admirable system of jurisprudence.

" ' "This court *** is not restricted from its use by section 10 of article 6 of the Constitution, providing that the judges of inferior courts of law and equity shall have power to issue it in civil cases to remove them from any inferior jurisdiction into a court of law. This provision was only intended as a guaranty of the continuance of a power with which these judges were already vested." ' "

"Our Statute was not intended to work a change in the common-law function of the writ, as a supervisory or 'superintending writ' as it has been called."

ARGUMENT

The rigid and unreasonable terms of the injunction were brought to the Court's attention soon after the injunction was granted by a motion "To dissolve injunction issued against Nathan Inman Goff, Jr.", but the Court in entering its Order Modifying Injunction (TR 39) ruled "That the motion should not be granted to the extent requested, but that the injunction should be modified to permit certain funds only to be released to the complainant in order that he might pay certain installments due and past due on certain mortgages, his medical and hospital bills accrued as a result of his confinment incident to a lunacy proceeding, and bills accrued and to become due for repairs and maintenance of certain rental property." It was called to the Court's attention that the funds released "wouldn't begin to cover the expenses he (petitioner) already has." (TR 87) and further counsel for petitioner stated to the Court: "I think it is an unnecessary strain, and, of course, I do except to the Court's ruling, not only with regard to the point of money, but in tying up all of his business affairs, as the Court would be doing under the ruling that is being made at this time." (TR 105) Further, the Trial Court was put on notice (TR 114) that "We have X number of dollars, and you substract Y number of dollars, and whatever is left—and in this case Y will be greater than X." Saying in effect that the Court was not releasing from the injunction sufficient funds to meet the order entered by the Court and that petitioner's right to continue his business investments were being ignored.

In this regard, it should be noted that the petitioner was completely destitute from December 20, 1965 to and including the time of the entiry of the order, above mentioned, on February 4, 1966. (TR 85)

After several appearances in Court with petitioner's attorney attempting to obtain relief from the Court, a Consent Order Modifying Injunction (TR 61) was entered on April 12, 1966 whereby certain funds in a bank account and one-half of certain gold stock certificates were released from the injunction and a trust was established whereby one-half of the funds were paid to petitioner's attorney for disbursement to respondent, to the mortgagee on the homeplace, to the parties' attorneys as fees; all as a result of negotiation. But it should be noted that an effort was made by respondent for some sort of hearing, with the Court's full cooperation and without sufficient notice, to hold petitioner in contempt of court (TR 119-122); with comments from the Court: "He may be in contempt of court." (TR 124); and "Well, now, we can put it this way, we are not threatening him, and he is not here. If I did that and he didn't do it, I would put him in jail as quick as a wink and not for ten days either." (TR 129); and "You can give him my word, Mr. Ely, I don't know that he is trying to play games with the Court, but if he is I will put him in jail, you can give my word, and please explain it to him, it won't be for ten days it will be for six months. I will give him the worse, you can tell him that, when he tries to buck the court's order" (TR 132); and "If he balks just let me know that he balks, and he certainly will have a reception committee waiting for him when he comes back, I will tell him that." (TR 134)

That, while the Court had previously acknowledged the lack of authority to order payment of funds into Court by someone not a party to-wit: "Now, the only thing that

poses a qeustion, of course, the bank is also a party as a garnishee—whether the Court can order them—the bank —to pay anything—" (TR 127); but, nevertheless, the Court was pleased to enter an order on August 12, 1966 (TR 73) doing exactly that which it acknowledged earlier that it had no authority to do, to-wit: Order the payment of the sum of $4,261.40, received as dividends on the gold stock owned separately by the petitioner, as trustee, paid one-half to petitioner and one-half in trust for future support and maintenance and past support and maintenance for respondent and the children; though by previous order (TR 61), the Court removed dividends due, or to become due on said gold stock entirely from the injunction.

The denial of due process of law and the denial of equal protection of law guaranteed by the Fifth Amendment and the Fourteenth Amendment, Section 1, respectively, of the United States Constitution is abundantly apparent when the transcript is reviewed in relation to the Assignments of Error: 1. The order (TR 73) dividing $4,261.40 between petitioner and a trustee for respondent and the two minor children may have been intended for a worthy cause, but the fact remains that the funds were not under attachment; that the company in whose hands the funds were then held was not a party to the suit and that no process had brought the funds before the Court in any manner whatsoever; 2. The interest of minors were involved in a Trust Agreement (TR 92), but the Court imposed orders upon the trust without first appointing a guardian ad litem to make a report concerning the interests of the minors and then adjudicate as to their rights; 3. That the Court, on its own motion, ordered payment of funds, though petitioner was not in arrears for payment of support and maintenance; 4. The Court refused to follow its own Rule X which requires a sworn petition to be filed when the modifica-

tion of a decree is sought and a day certain set for the hearing thereof; 5. The pattern established by the trial court in ruling consistently with suggestions made by the attorney for the respondent clearly shows an inclination unreasonably favorable to respondent and her attorney; 6. The Tennessee Appellate Courts failing to take cognizance of the illegal actions of the Trial Court and its constant and gross abuse of discretion; and 7. Actions taken by the Trial Court during the pendency of requests for review by Appellate Courts (Supported by Affidavit attached hrereto) further indicating discrimination in favor of respondent and her attorney and against petitioner and his attorney.

It is respectfully urged to this Honorable Court in its demonstrated desire to protect the rights of individuals that this Honorable Court should take cognizance of the many acts of abuse of discretion, many being illegal, by the Trial Court and rule thereon to the end that the errors complained of by petitioner may be appropriately noted and appropriate order issue correcting the wrongs and errors of which petitioner compains and requiring that the cause be tried in a different division in the Circuit Court of Shelby County, Tennessee and before a jury.

Respectfully submitted,

Richard T. Ely

Richard T. Ely
Attorney for Petitioner

Marvin Brooks Norfleet
Attorney for Petitioner

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Richard T. Ely, being duly sworn, make oath that I am counsel for Nathan Inman Goff, Jr., the petitioner; that I am familiar with the facts stated in the foregoing petition and that the same are true, except those stated on information and belief, and those I believe to be true, and further that, in my opinion, petitioner is entitled to the relief prayed.

Richard T. Ely

Richard T. Ely

Subscribed and sworn to before me this the 19... day of July, 1967.

William L. Swain Jr

Notary Public

My commission expires April 9, 1968.

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF SHELBY

Richard T. Ely, Attorney for Petitioner, after having been first duly sworn, states under oath the following:

That since the petitioner undertook to have the Appellate Courts of the State of Tennessee review the actions of the Trial Court, the Trial Court has been pleased to entertain and act upon the following matters:

A motion to Modify Injunction and for Disbursement of funds was entered; the Court acting upon said motion, entered its Order for Merrill Lynch, Pierce, Fenner & Smith, Inc., to pay into the hands of Clerk of the Court the sum of $2,828.80, which were dividends on the gold stock, to be disbursed to the respondent for support and maintenance of

herself and children and to be paid to the mortgagee on installments on the residence in which respondent lives. To all of which action, the petitioner excepted.

An Order Allowing Amendment and Amendment to Amended Bill for Divorce were entered and filed respectively; a Fiat was issued on the basis of the Amendment to Amended Bill for Divorce wherein it was alleged that petitioner, cross-defendant below, "is a non-resident of the State of Tennessee and a resident of the State of Florida, *** "and said Fiat instructed the Clerk of the Court to issue Order of Publication of Attachment of certain real properties, making the appearance date on the first Monday in July, 1967, for cross-defendant to make his appearance and plead, answer or demur to the cross-complainant's Original and Amended Bill and Amendment to Amended Bill for Divorce and Attachment, which publication appeared in The Daily News on May 30, June 6, 13, 20, 1967 and to which petitioner filed his Demurrer.

An Order relieving trustee and requiring an accounting was entered; an accounting being first and final accounting of trustee was filed; a Consent Order for Examination of Defendant Sue Ellen Weems Kinney Goff was entered and the physician making the examination found said defendant to be mentally competent.

An Answer of Garnishee, Merrill Lynch, Pierce, Fenner & Smith, Inc. was filed admitting the gold stocks in the account of Nathan Inman Goff, Jr., as Trustee, listing said stocks.

The Court or the Clerk thereof set this cause for hearing on the 10th day of July, 1967, being one week after the appearance date of the aforesaid publication and also the setting of the case was made before the appearance date when the case was not at issue. On July 10, 1967, when the case was called, petitioner's attorney insisted that the cause was not properly before the Court; to which comment respondent's attorney conceded the point and the Court continued the case to await action on the Demurrer and subsequent pleadings, if any, suggesting to the attorney for respondent that he enter appropriate motions to dispose of the Demurrer, to request an additional pendente lite fee of $2,500.00 and an order for the payment in to the hands of the Clerk of approximately $1,500.00 for future payments of support and maintenance to respondent and the children.

The Trial Court was advised of this petition being prepared and in the printer's hands at the time.

The following motions were made by respondent and acted upon by the Court:

Motion No. 1. That the Court order the dividends held by Merrill Lynch, Pierce, etc. on the gold stock in the approximate amount of $1,506.00 paid to Ben C. Wessels, Clerk, so that Mrs. Goff and the children can receive support pendente lite.

Motion No. 2. That the Court allow Ben C. Wessels, Clerk, to pay $193.00 publication costs to The Daily News.

Motion No. 3. That the Court allow me a pen-

dente lite fee of $2,500.00 pending further proceedings in this cause.

Motion No. 4. That the demurrer filed in this cause be stricken and overruled for the following reasons: 1. That it is frivolous and filed only for the purpose of creating a delay.

The Court granted the first motion to which petitioner excepted; the Court overruled the second motion; the Court allowed a further pendente lite fee in the sum of $1,000.00 to which petitioner excepted; the fourth motion was granted which overruled the petitioner's Demurrer to which petitioner excepted.

In both instances above stated, the Court has ordered payment into the hands of the Clerk of the Court of funds in the hands of Merrill Lynch, Pierce, Fenner & Smith, Inc. without attachment, garnishment, or the naming of said company as a party defendant in the cause; therefore, without due process of law.

In testimony whereof affiant has hereafter affixed his signature.

Richard T. Ely

Richard T. Ely
Attorney for Petitioner

Subscribed and sworn to before me at Memphis, Tennessee, on the 19 day of July, 1967.

William R. Irwin Jr

Notary Public

My commission expires April 9, 1968.

SUPREME COURT, U. S.

FILED
AUG 12 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

Vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent.

No. 485

APPENDIX

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IN THE

CIRCUIT COURT OF SHELBY COUNTY,

TENNESSEE

NATHAN INMAN GOFF, JR. Complainant. Vs. SUE ELLEN WEEMS KINNEY GOFF, Defendant.	No. 3531 R. D. Entered: Feb. 4, 1966 Minute Book 8, Page 203, Div. 6

ORDER MODIFYING INJUNCTION

This cause came on this 4th day of February, 1966, before the Honorable Friel Hastings, Judge, Division VI of the Circuit Court of Shelby County, Tennessee, upon motion of complainant "To Dissolve Injunction Issued Against Nathan Inman Goff, Jr.", upon the record as a whole and upon the testimony of the complainant and the defendant.

And it appearing to the Court that the motion should not be granted to the extent requested, but that the injunction should be modified to permit certain funds only to be released to the complainant in order that he might pay certain installments due and past due on certain mortgages, his medical and hospital bills accrued as a result of his confinement incident to a lunacy proceeding, and bills accrued and to become due for repairs and maintenance of certain rental property.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the injunction heretofore issued in this cause against Nathan Inman Goff, Jr., be, and the same is hereby, modified so as to strike, cancel, delete and remove from said injunction the following items, to-wit:

> First National Bank of Memphis, enjoining them from disbursing any funds, until further orders of this Court on Account No. 20-0137138, Nathan I. Goff, Jr.
>
> First National Bank of Memphis, enjoining them from disbursing any funds, until further orders of this Court on Savings Account No. 20-7405545, Nathan Inman Goff, Jr.
>
> D. W. McLemore Company, of Memphis, enjoining them from paying any funds over to cross-defendant or his agent or attorney, which is collected monthly on rental property, but to deposit same in commercial account, except upon orders of this Court.

2. That the complainant shall, notwithstanding the injunction heretofore issued against him, have the right and privilege of receiving the sums from the First National Bank of Memphis, Germantown Branch, totalling $4,487.26, more or less; and from D. W. McLemore Company in the amount of $1,721.08 as well as any additional monies that may be or become due to complainant by said D. W. McLemore Company from time to time; and from all of said proceeds complainant may pay certain installments due or past due or to hereafter become due on certain mortgages and he may pay bills now due or which may hereafter be-

come due for repairs and maintenance to certain rental property; and complainant may pay his doctor bills, hospital bills, and other expenses accrued as a result of a certain lunacy proceeding.

3. That the rest and remainder of the injunction heretofore issued against the complainant in this cause shall, and the same is hereby, continued and in full force and effect.

To which action of the Court the complainant excepts.

/s/ Friel Hastings, Judge
Enter: Feb. 4, 1966

/s/ Richard T. Ely,
Attorney for Complainant

/s/ Tom P. Mitchell,
Attorney for Defendant

IN THE

CIRCUIT COURT OF SHELBY COUNTY,

TENNESSEE

NATHAN INMAN GOFF, JR. Complainant. Vs. SUE ELLEN WEEMS KINNEY GOFF, Defendant.	No. 3531 R. D. Entered: April 12, 1966 Minute Book 8, Page 319, Div. 6 Hon. Friel Hastings, Judge

CONSENT ORDER MODIFYING INJUNCTION

This cause came on to be heard upon written motion of the Cross-Complainant, Sue Ellen Weems Kinney Goff, filed in this cause, upon the testimony of Defendant and Cross-Complainant, Sue Ellen Weems Kinney Goff, upon statement of the attorneys for both parties, and upon the record as a whole following which the Court took the Motion under advisement and, while under advisement, and with the advice and consent of this Honorable Court, the parties reached an agreement, whereby certain funds in the First National Bank of Memphis heretofore impounded by injunction should be released from the injunction and one-half of certain gold stocks, held by Merrill Lynch, Pierce, Fenner & Smith, Inc., heretofore impounded by injunction, and dividends due, or to become due on said gold stocks should be removed entirely from the aforesaid injunction.

That said one-half of gold stock, as listed below, and all dividends on said gold stock now due from said stock

should be turned over to the Honorable Richard T. Ely for the Complainant and Cross-Defendant, Nathan Inman Goff, Jr. The remaining one-half of gold stock will remain impounded by injunction in the hands of Merrill Lynch, Pierce, Fenner & Smith, Inc., and further that one-half of dividends due from said gold stock shall be paid by the said Richard T. Ely to Nathan Inman Goff, Jr., and the remaining one-half of said dividends shall remain in the hands of the said Richard T. Ely as Trustee for the use and benefit of Sue Ellen Weems Kinney Goff, and the two (2) children of the parties.

The sum of $6,080.20, released from the First National Bank of Memphis shall be divided as follows: One-half of said funds shall remain in the hands of the Honorable Richard T. Ely as Trustee, for the use and benefit of Sue Ellen Weems Kinney Goff, and the two (2) children of the parties, and the remaining one-half shall be paid to the Complainant and Cross-Defendant, Nathan Inman Goff, Jr.

The said Richard T. Ely is hereby ordered to pay from funds held by him as Trustee for Sue Ellen Weems Kinney Goff, and the two (2) children of the parties, as follows:

1. To Sue Ellen Weems Kinney Goff the sum of $729.00, as support and maintenance for February, March and April, 1966; and

2. To Leader Federal Savings & Loan Association the sum of $214.00 for the March and April, 1966, installments on the mortgage on 4500 Lawrence Avenue, Memphis, Tennessee; and

3. To Tom P. Mitchell, Attorney, the sum of $500.00 as his temporary fee heretofore awarded; and

4. To Richard T. Ely, the sum of $500.00, as his partial attorney fee due from Nathan Inman Goff, Jr.

Further, the said Richard T. Ely shall maintain the balance of said bank account and one-half of the dividends of said gold stocks for the use and maintenance of Sue Ellen Weems Kinney Goff, and the two (2) children of the parties; and on the 4th day of each month, he, the said Richard T. Ely, shall pay the installment on the mortgage, in the amount of $107.00, on the residence of 4500 Lawrence Avenue, and pay to Sue Ellen Weems Kinney Goff, the sum of $243.00 for the support and maintenance, and for the use and benefit of the said Sue Ellen Weems Kinney Goff and the two (2) children of the parties, until further orders of this Court; provided, however, that a credit is due Complainant and Cross-Defendant, Nathan Inman Goff, Jr., against support and maintenance of the total sum of $199.50.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, by consent, that the injunction heretofore issued be, and the same is hereby amended and modified so as to strike, cancel, delete and remove the following items, to-wit:

> First National Bank of Memphis, enjoined from disbursing any funds until further orders of this Court in account number 05-6436005, Nathan I. Goff, Trustee.
>
> Merrill Lynch, Pierce, Fenner & Smith, Inc., enjoined from transferring, selling or disposing of any of the stock until further orders of this Court, 564 26613, as follows:
>
> 1750 shares Free State Ged.
> 1000 shares Pres. Brand
> 1000 shares Pres. Steyn
> 500 shares Stilfontein
> 1500 shares Hartebeestfontein

Nathan I. Goff, Jr., Complainant and Cross-Defendant, enjoyned from transferring, selling or disposing of any of the stocks, monies, either by himself, or through his attorney and/or agent.

FURTHER, IT IS ORDERED, that the gold stocks above mentioned amounting to one-half of the stocks, subject of the injunction, and dividends due, shall be turned over to the Honorable Richard T. Ely for Nathan Inman Goff, Jr.

FURTHER, IT IS ORDERED, that the funds amounting to $6,080.20, in the First National Bank of Memphis, and subject to the injunction, shall be paid over to the Honorable Richard T. Ely, and he is authorized to make the following disposition thereof:

1. That the said gold stocks, by this instrument released, may be turned over to the Complainant and Cross-Defendant, Nathan Inman Goff, Jr.

2. That one-half of the dividends due on said gold stocks shall be paid by the Honorable Richard T. Ely to Cross-Defendant, Nathan Inman Goff, Jr.

3. That one-half of the funds released from the First National Bank of Memphis, shall be paid by the Honorable Richard T. Ely to the Cross-Defendant, Nathan Inman Goff, Jr.

4. That the remaining one-half of the monies in the First National Bank of Memphis, plus one-half of dividends from all gold stocks shall be retained by Richard T. Ely, as Trustee.

FURTHER, IT IS ORDERED, that the Honorable Richard T. Ely immediately pay from said funds to the Defendant and Cross-Complainant, Sue Ellen Weems Kinney Goff, the sum of $729.00, as support and maintenance for February, March and April, 1966; and

FURTHER that the said Richard T. Ely, immediately pay the sum of $214.00 to Leader Federal Savings & Loan Association, for the March and April, 1966, installments on the residence of 4500 Lawrence Avenue, Memphis, Tennessee; and

FURTHER, IT IS ORDERED, that the said Richard T. Ely shall immediately pay to Tom P. Mitchell, Attorney, the sum of $500.00 as his temporary fee, awarded by this Court; and

FURTHER, IT IS ORDERED, that the said Richard T. Ely shall pay to himself a partial fee due him from Nathan Inman Goff, Jr., in the sum of $500.00.

FURTHER, IT IS ORDERED, that the said Richard T. Ely maintain the remaining balance of dividends and funds from the First National Bank of Memphis, and shall pay, on the 4th day of each month, installments on the mortgage on the property at 4500 Lawrence Avenue, Memphis, Tennessee, in the amount of $107.00; and the sum of $243.00, per month, to Sue Ellen Weems Kinney Goff, for support and maintenance of herself and the two (2) children of the parties.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED BY THE COURT ON THIS THE 12th DAY OF APRIL, 1966.

/s/ Friel Hastings, Judge

APPROVED:

/s/ Richard T. Ely

/s/ Tom P. Mitchell

IN THE

CIRCUIT COURT OF SHELBY COUNTY,

TENNESSEE

NATHAN INMAN GOFF, JR.
Complainant and
Cross Defendant

Vs.

SUE ELLEN WEEMS KINNEY GOFF,
Defendant and
Cross Defendent.

No. 3531 R. D.

Entered: Aug. 12, 1966
Minute Book 8,
Page 519, Div. 6

ORDER

This cause came on this day to be heard before the Honorable Friel Hastings, Judge of Division VI of the Circuit Court of Shelby County, Tennessee, upon the Motion of the Complainant and Cross Defendant, Nathan Inman Goff, Jr., for transfer of this cause to another division of Court, which Motion the Court finds is not well taken, and is overruled, to which action of the Court the said Complainant and Cross Defendant excepted and prayed a discretionary appeal, the same being denied to which further action of the Court, the Complainant and Cross Defendant excepted.

/s/ Friel Hastings, Judge
Enter: Aug. 12, 1966

APPROVED:
/s/ Richard T. Ely,
Attorney for Complainant and Cross Defendant.
/s/ Tom P. Mitchell,
Attorney for Defendant and Cross Complainant.

IN THE

CIRCUIT COURT OF SHELBY COUNTY,

TENNESSEE

NATHAN INMAN GOFF, JR.
Complainant and
Cross Defendant.

Vs.

SUE ELLEN WEEMS KINNEY GOFF,
Defendant and
Cross Camplainant.

No. 3531 R. D.

Entered:
August 12, 1966
Minute Book 8,
Page 519, Div. 6
Hon. Friel Hastings,
Judge

ORDER

This cause came on this day to be heard before the Honorable Friel Hastings, Judge of Division VI of the Circuit Court of Shelby County, Tennessee, upon the motion of Sue Ellen Weems Kinney Goff, to allow, among other things, Richard T. Ely, Trustee to resign as trustee and to pay certain funds, in the hands of the said Richard T. Ely, into the Clerk of this Court, and

It appearing to the Court, after able argument presented by Richard T. Ely and Tom P. Mitchell, on said motion that at the time of the entry of the Consent Order in this cause, there were no liquid assets and certain matters had to be paid; that at that time it was then in the contemplation of all that said divorce would be tried within the next two or three weeks ensuing that, but that was not the case. That since this divorce was not heard at that time, Richard T. Ely, began paying funds out as Trustee, and has nearly reached the bottom of the barrel of funds he had on hand, and

It further appearing to the Court that Richard T. Ely, since the entry of the Consent Order in this cause, has received the sum of $4,261.40, as dividends on gold stocks, of which $1,226.40 was due at the time of the said entry of said consent order, and the sum of $3,035.00, represents recent dividends due, since the entry of said consent order.

The Court is of the opinion, AND SO ORDERS, that the total dividends in the amount of $4,261.40 be divided as follows:

> The sum of $2,130.70 of the dividends on said gold stock to be paid over to Nathan Inman Goff, Jr., individually and
> The sum of $2,130.70 of the dividends on said gold stock be received by Richard T. Ely as Trustee for Sue Ellen Weems Kinney Goff and the two minor children of the parties.

This being done in order to insure the payment currently of alimony and child support as ordered by the Court, and in order to insure the payment of the mortgage on the property, at 4500 Lawrence, Memphis, Shelby County, Tennessee.

Further, the Court is of the opinion that the said Nathan Inman Goff, Jr. would be protected, in that his own attorney would hold said funds, notwithstanding his holding it as Trustee, should he so elect.

IT IS FURTHER ORDERED, that in the alternative, Richard T. Ely, Trustee, may, in his discretion, resign as said Trustee, file an accounting, and upon the approval of said settlement by the Court pay the remaining funds in his hands, as Trustee, to the Clerk of this Court, who, in such event, shall pay from said funds to Sue Ellen

Weems Kinney Goff, for herself and the use and benefit of the two minor children of the parties, the sum of $243.00 per month; and to Leader Federal Savings & Loan Association, the sum of $111.00 per month, being the monthly installment on the mortgage on the residence at 4500 Lawrence, Memphis, Shelby County, Tennessee.

To all of which action of the Court, the Complainant and Cross Defendant, Nathan Inman Goff, Jr., excepted and prayed for a discretionary appeal, which the Court refused, and to which further action the Complainant and Cross Defendant, Nathan Inman Goff, Jr., excepted.

/s/ FRIEL HASTINGS
Judge

ENTER: Aug. 12, 1966

APPROVED:

/s/ RICHARD T. ELY,
Attorney

/s/ TOM P. MITCHELL
Attorney

IN THE

COURT OF APPEALS,

WESTERN DIVISION

NATHAN INMAN GOFF, JR.
PETITIONER

Vs.

SUE ELLEN WEEMS KINNEY GOFF,
RESPONDENT

Filed: Feb. 23, 1967

Bessie Buffaloe, Clerk
Minute Book 59,
Page 18

On the 13th day of September, 1966 there was presented by the Petitioner, Nathan Inman Goff, Jr., to a member of this Court, his Honor, Judge L. D. Bejach, a petition for writ of Certiorari and Supersedeas seeking to have certain orders of the Honorable Friel Hastings, Judge of Division Six of the Circuit Court of Shelby County, reviewed and set aside, among which was an order of the Court denying the original petitioner a change of venue.

Judge Bejach refused to grant the Writ of Certiorari and Supersedeas, saying:

> "Within application for writs of certiorari and supersedeas denied, because this Judge is of opinion that the petitioner's remedy, if any, is by appeal.
>
> "This the 13th day of Sept., 1966.
>
> "/s/ L. D. Bejach, Chancellor."

Thereafter on September 19, 1966, the petitioner for-

warded said petition, together with a transcript of the record in the Trial Court to the Clerk of this Court, together with a letter in which he requested that the petition for certiorari and supersedeas be considered by the whole Court. In the letter he said:

> "It is respectfully requested that the enclosed be filed and brought to the attention of the court at the earliest possible date with the request that a hearing be granted."

No motion was made at that time to set aside the order of the aforesaid Judge of this Court, who was a former Chancellor in the Chancery Court of Shelby County. At that time petitioner filed in this Court what he termed "Assignment of Errors."

On February 15, 1967, Respondent filed a Petition to Sustain the Action of Judge Bejach in denying writ of certiorari and supersedeas, and to strike the record.

This matter was preliminarily heard before this Court on the 23rd day of February, 1967, when both parties appeared by counsel and presented argument on the question of whether the order made by Judge Bejach should be sustained or denied.

It is the opinion of the Court that the Petition for Certiorari is not well taken and, therefore, is denied. It is further the opinion of this Court that the action sought in this Court with respect to the decrees appearing in the record would be purely interlocutory in nature and that the case should be proceeded with in the Court below to such a final decree as might bring the whole matter up to this Court, if appeal is properly granted and perfected.

IT IS, THEREFOR, ORDERED That the Petition for Certiorari and Supersedeas be denied and the entire record

as now filed in this Court be remanded to the Circuit Court of Shelby County, Division Six for such further and other action as may be properly and legally had therein, and that no prejudice to the rights of any party in the future proceedings of that Court may result from the filing of the petition in this Court. The cost of this temporary proceeding is assessed to petitioner.

IT IS ACCORDINGLY ORDERED AND DECREED that this order will be entered on the minutes of this Court on this date.

This February 23, 1967.

Judge

Judge

IN THE

SUPREME COURT OF TENNESSEE,

WESTERN DIVISION

NATHAN INGMAN GOFF, JR.
VS.
SUE ELLEN WEEMS KINNEY GOFF } SHELBY LAW DENIED

This cause came on to be heard upon a petition for certierari, and after full consideration by the Court, the Court is of opinion that there is no merit in said petition, and the same is accordingly denied at the cost of the petitioner, for which let execution issue.

FILED
April 3, 1967
BESSIE BUFFALOE, Clerk
Minute Book 99, page 5.

IN THE

SUPREME COURT OF TENNESSEE,

WESTERN DIVISION

NATHAN INMAN GOFF, JR. VS. SUE ELLEN WEEMS KINNEY GOFF	SHELBY LAW PETITION TO REHEAR DENIED

This cause came on to be heard upon a petition to Rehear, and after full consideration by the Court, the Court is of opinion that there is no merit in said petition, and the same is accordingly denied at the cost of the petitioner, for which let execution issue.

FILED
May 15, 1967

BESSIE BUFFALOE, Clerk
Minute Book 99, page 34.

LIBRARY
SUPREME COURT, U. S.

No. 485

FILED
SEP 12 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

TOM P. MITCHELL,
Attorney for Respondent,
60 North Third Street
Memphis, Tennessee 38103

HEARN W. TIDWELL,
Suite 1101
Home Federal Building
Memphis, Tennessee 38103

Of Counsel

The Daily News, Memphis, Tenn., 9/8/67—25c

COUNTER STATEMENT OF QUESTIONS INVOLVED

I

Proceedings for divorce and control of funds for alimony and child support are wholly statutory and therefore, no Federal question is involved in this proceedings.

Petitioner's claim of jurisdiction is not supported by Federal Rules of Civil Procedure or case law.

II

Do the Statutes of the State of Tennessee vest authority in the Circuit and Chancery Courts to determine a division of properties, both real and personal, for the purposes of alimony and support and maintenance of children of the Petitioner?

The Statutes of the State of Tennessee do concisely and precisely grant jurisdiction of the assets of the parties by the trial court, both pendente lite and permanently, for the benefit of the wife and minor children.

III

Did the Petitioner, by virtue of the Consent Order Modifying Injunction, as entered April 12, 1966, waive his Constitutional or statutory right to except to the ruling of the Court?

The Court of Appeals for the Western Division of the State of Tennessee, in denying the Petitioner's relief on his Petition for Certiorari, held that the action of the Petitioner before that court, with respect to the Decrees as entered by the trial court, were purely interlocutory in nature and that the case should be proceeded within the court below to a final Decree before any relief could be granted by an appellate court.

IV

Do the Statutes of the State of Tennessee authorize the Judges of the Circuit Court or Chancellors of the Chancery Court to impose restrictions pendente lite upon trust agreements and thereby hold in abeyance any funds subject to control by the Petitioner, pending a hearing of the cause on its merits?

All Statutes of the State of Tennessee conferring jurisdiction upon the trial courts effectively confer discretionary power to such tribunals, both as to pendente lite and final Orders and Decrees.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent.

No.....

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

BRIEF AND APPENDIX OF RESPONDENT, SUE ELLEN WEEMS KINNEY GOFF

Petitioner has presented ten (10) Assignments of Error, which may be reduced to four, in accordance with Respondent's Counter Statement of Questions Involved.

This cause has not been tried upon its merits; therefore, no right of appeal is granted to the Petitioner. The Motion of the Petitioner before the trial court for a discretionary appeal was properly denied by the trial court in that the Petitioner, before that court, could have preserved all his exceptions to the rulings of the trial Court by the

authorized statutory procedure of Wayside Bill of Exceptions. This the Petitioner failed or neglected to do.

Jurisdiction is predicated by the Petitioner upon Amendment V and Amendment XIV to the Constitution of the United States. The entire record in this cause contains numerous summons which were personally served upon the Petitioner. The Petitioner having removed himself from the jurisdiction of the trial court, pending hearing of the cause, some of these processes are shown "NOT TO BE FOUND". The original process in this cause was instituted for and on behalf of the Petitioner on his Original Bill for Divorce, filed in the Circuit Court of Shelby County, Tennessee, on December 23, 1965, (tr. p. 6) Respondent's Answer and Cross-Bill for Separate Maintenance (tr. p. 27) was filed January 5, 1966 and personal process was served upon Nathan Inman Goff, Jr. on January 5, 1966. Thereafter all legal processes were returned "NOT TO BE FOUND IN SHELBY COUNTY". The Petitioner, therefore, has not been deprived of his property without due process of law in accordance with Amendment V to the Constitution of the United States.

Jurisdictional question two as raised by the Petitioner relies upon the denial of equal protection of the law as set forth in Amendment XIV to the Constitution of the United States. The Petitioner at all time has been represented by competent counsel and no Orders, Decrees or action of the trial court has been determined or Order entered without counsel for the Petitioner being given a complete hearing.

By virtue of Title 28, Paragraph 1251, et seq., U. S. Code, jurisdiction of this Honorable Court cannot be maintained for the following reasons:

1. This is a cause of action between two individuals.

2. Title 28, Paragraph 1257, U. S. Code, provides that Writ of Certiorari may be entertained by this Honorable Court from final judgments or decrees rendered by the highest court of a state in which a decision could be had, only upon limited questions involving the validity of a treaty or statute of the United States or where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

COUNTER QUESTION OF STATEMENT NO. I

Section 36-820, Tennessee Code Annotated, being Chapter 8, of Title 36, styled, "Divorce or Annulment", the following statute was in full force and effect at all times during this proceeding:

"T.C.A. 36-820, Alimony for support of wife and children.

Whether the marriage be dissolved absolutely, or a perpetual or temporary separation be decreed, the court may make an order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, **or out of his property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control**; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown. Courts having jurisdiction of the subject-matter and of the parties are hereby expressly authorized to provide for the future support of wives and children, in proper cases, by fixing some definite amount or amounts to be paid in monthly, semi-monthly, or weekly instalments, or otherwise, as circumstances may warrant, and such awards, if not paid, may be enforced by any appropriate process of the court having jurisdiction thereof, including levy of execution. The order or decree of the court may provide that the payments for

the support of such child or children shall be paid either to the clerk of the court or direct to the mother or other person awarded the custody of said child or children." (emphasis supplied)

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

Petitioner assigns as error that the trial court abused its discretion in that it completely stripped the Petitioner of all of his rights to continue his business or personal affairs. By the Consent Order as entered in the cause on April 12, 1966 (tr. p. 61) the Petitioner before this Honorable Court agreed to a division of his properties for the purposes of this litigation and is therefore now estopped to deny that his property was taken without due process of law. This Consent Order, approved by the trial judge, was entered by consent of counsel representing both parties and no exceptions were taken to the action of the court in signing and entering the Order upon the Minutes of the Court. We find no denial of due process of law or any denial of equal protection of the law when any person, through his counsel of record, enters into a Consent Order or Decree. Petitioner's assertion of abuse of discretion cannot be well founded upon his having consented to the provisions as set forth in the Order of April 12, 1966 (tr. p. 61). Tennessee Code Annotated Section 36-821.

COUNTER QUESTION OF STATEMENT NO. II

Section 36-820 T.C.A., supra, coupled with Section 36-822 T.C.A., vests the authority and power within the trial court to enforce its Orders and Decrees. Section 36-822 Tennessee Code Annotated reads in words and figures as follows:

"T.C.A. 36-822. Enforcement of Decree for Alimony and Support.

The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the husband, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful means as are usual and according to the course and practice of the court, as to the court shall seem meet and agreeable to equity and good conscience.

The wife or other person to whom the custody of the child or children is awarded, shall be entitled to enforce the provisions of the court's orders or decrees concerning the support of such child or children, and to recover judgment for defaults in the payments directed and to obtain execution thereon and otherwise enforce payment thereof, all on behalf of the child or children.

The wife in her own behalf, or the wife or other person to whom the custody of the child, or children, is awarded, may recover from the husband reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change or custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court."

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

COUNTER QUESTION OF STATEMENT NO. III

This cause still remaining to be heard upon its merits, is currently of an interlocutory nature and all orders and decrees of the trial court are pendente lite and therefore, the cause has not proceeded to any final order or decree with respect to the property rights or assets of the Petitioner, other than that as contained in the Consent Order Modifying Injunction dated April 12, 1966.

Petitioner assigns as error the Order of the Court entered on August 12, 1966 (tr. p. 73). This particular matter came before the court upon the Motion of Respondent, Sue Ellen Weems Kinney Goff, (tr. p. 71) for an Order disbursing funds on hand with the Trustee and to allow Richard T. Ely, Esquire, Counsel for Petitioner, to resign as Trustee and file an accounting. The learned trial judge, based upon the proper motion before the court, ordered that certain dividends as had been received on the gold stock of the Petitioner be divided equally between the Petitioner, Nathan Inman Goff, Jr., and the Trustee in order to insure the payment of alimony and child support as previously decreed by the court. This would follow to have been within the power and authority vested in the trial court in accordance with Section 36-822 T.C.A., supra. We respectfully refer the court to the wording of the Order entered by the court as follows:

> "Further, the court is of the opinion, that the said Nathan Inman Goff, Jr. would be protected, in that his own attorney would hold said funds, notwithstanding his holding it as trustee, should he so elect." (tr. p. 74)

This Order further provided that the Honorable Richard T. Ely, Trustee, could in his discretion, resign as trustee, and upon proper accounting pay the remaining funds held

by him as trustee into the hands of the Clerk of the Court. This accounting and payment was to be made to the Clerk of the Court for the use and benefit of the Respondent and her two minor children.

It was upon this Order that the Petitioner prayed for a discretionary appeal which was refused by the Court. The power and authority of the trial court to act in this regard is specifically authorized by Section 36-820 T.C.A., supra, and Section 36-822, T.C.A., supra. The validity and/or Constitutionality of these statutes has not been questioned by Petitioner. Tennessee Code Annotated Sec. 36-825.

COUNTER QUESTION OF STATEMENT NO. IV

By order of the Court entered February 4, 1966 (tr. p. 38) the court awarded your Respondent the sum of $243.00 per month as support and maintenance for herself and her two minor children until further orders of the court. Petitioner assigns as error that it was improper for the trial court to make statements to the effect that Petitioner was in contempt of court or might be in contempt of court. By virtue of the Consent Order Modifying the Injunction (tr. p. 61) the court ordered that the Petitioner, Nathan Inman Goff, Jr., pay to his wife as support and maintenance the sum of $729.00 which represented an arrearage of support and maintenance for the months of February, March and April 1966 and therefore, the Petitioner was in contempt of court and subject to the power and authority of the court to so determine, based upon its order of February 4, 1966. Tennessee Code Annotated Sec. 36-835.

The Circuit Courts of the State of Tennessee are granted concurrent jurisdiction with that of the Chancery Courts to act on matters in trust. Section 16-508 T.C.A. grants the concurrent jurisdiction as follows:

"16-508. Divorce — Adoption — Trustees. — It has concurrent jurisdiction with the Chancery Court to grant divorces, to authorize the adoption of children, to release testamentary and other trustees, and to appoint trustees in place of those released or dead, and also to decree, on petitions of trustees, by will or otherwise, for the sale of property, real or personal."

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

ARGUMENT

The questions presented to the court for decision on this Petition for Writ of Certiorari and Supersedeas are based upon jurisdiction and abuse of discretion on the part of the trial judge.

A review of this entire record and a careful analysis of all cases cited by the Petitioner fails to reveal any federal jurisdictional question in matters between two citizens in which the validity of the Constitution of the United States or of a state statute has been affirmatively attacked by the Petitioner. The cause being at issue and awaiting trial, all orders and decrees as entered in the cause await the hearing and actual trial upon the merits. All action of the trial court has been to preserve and protect such rights and interests as the Respondent may have in the properties of the Petitioner as alimony and child maintenance and care after a hearing.

The injunctive orders of the court were likewise enforced to preserve and maintain in status quo certain assets of the Petitioner pending a trial on the merits. All real property of the Petitioner, not owned as tenants by the entirety by the parties, has been released to the Petitioner and an

equal division of the personal property has been ordered to the Petitioner and the Clerk of the Circuit Court in Trust for the future determination of the trial court, even though the Petitioner has removed himself from the jurisdiction of the court. No other affirmative relief could be granted to insure enforcement of the future orders of the trial court.

It is respectfully urged that the rights of both individuals have been given fair and equitable consideration by the trial court and that, therefore, all the assignments of error are not well founded and that Petitioner's Writ of Certiorari and Supersedeas should be denied in accordance with the authorities as set forth in this Brief and in conformity to the Order denying the Petition for Writ of Certiorari and Supersedeas by the Tennessee Court of Appeals and the Supreme Court of the State of Tennessee.

Respectfully submitted,

Tom P. Mitchell

TOM P. MITCHELL
Counsel for Respondent

Hearn W. Tidwell

HEARN W. TIDWELL
Counsel for Respondent,
of Counsel

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Tom P. Mitchell, being duly sworn, make oath that I am counsel for the Respondent, Sue Ellen Weems Kinney Goff; that I am familiar with the facts stated in the foregoing Reply Brief and that the same are true, except those stated on information and belief, and those I believe to be

true, and further that, in my opinion, Respondent is entitled to the relief prayed.

Tom P. Mitchell
TOM P. MITCHELL

Sworn to and subscribed before me this 11 day of September, 1967.

B Joyce Thomas
Notary Public

My commission expires:

.....

MY COMMISSION EXPIRES JULY 14, 1969

CERTIFICATE OF SERVICE

I certify that I have this day mailed two copies of this Brief and Appendix to Richard T. Ely, Esquire, Counsel for Petitioner, addressed to his office, 1100 Home Federal Building, Memphis, Tennessee, 38103 this 11 day of September, 1967.

Tom P. Mitchell
Tom P. Mitchell
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,
vs.
SUE ELLEN WEEMS KINNEY GOFF,
Respondent.
} No.....

APPENDIX

TENNESSEE CODE ANNOTATED:

Section 36-821. **Portion of husband's estate decreed to wife.**

In such case, the court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise.

(Code 1858, § 2469 (deriv. Acts 1841-1842, ch. 133, § 2); Shan., § 4222; Code 1932, § 8447.)

TENNESSEE CODE ANNOTATED:

Section 36-825. **Adjustment of interests in jointly owned property.**

In all actions for divorce or separate support and maintenance, the court having jurisdiction thereof may, in its discretion, adjust and adjudicate the respective rights

and interests of the parties in all jointly owned property, so as to preserve for each or either party, that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case, regardless of how the court may grant or refuse to grant relief in such case; and to this end the court shall be empowered to effectuate its decree by divesting and reinvesting title to such property and, where deemed necessary, to order a sale of such property and to order the proceeds divided between the parties.

(Acts 1953, ch. 90, § 1 (Williams, § 8446); 1959, ch. 192, § 1.)

TENNESSEE CODE ANNOTATED:

Section 36-835. **Enforcement of order or decree for support of minor.**

When any person, ordered to provide support and maintenance for a minor child or children, shall fail to comply with said order or decree, such person may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six (6) months.

(Acts 1961, ch. 201, § 1.)